

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NAVIGATORS INSURANCE
COMPANY, et al.,

Plaintiffs,

v.

CALPORTLAND COMPANY, et al

Defendants.

CASE NO. 2:10-CV-00665-MJP

ORDER ON MOTION TO COMPEL

This matter comes before the Court on Plaintiffs' motion to compel, which was filed using the joint format set out in Local Rule CR 37. (Dkt. No. 26.) Having reviewed the motion, the documents submitted in camera, and all related papers, the Court GRANTS in part and DENIES in the part the motion.

Background

Plaintiffs are a group of insurers who filed suit against CalPortland, and Glacier Northwest, Inc. (collectively "Glacier" or "Defendants"), alleging that Glacier negligently unloaded a barge loaded with aggregate on the Duwamish River. (Compl. ¶¶ 11-13.)

Defendants' actions allegedly caused the barge to suffer severe structural damage to the hull, deck, and internal structures. (§ 14.) The barge was declared a constructive total loss and the Plaintiff insurers incurred the expense of the constructive loss, surveys, towage, repairs and additional expenses. (§§ 14-15.)

Plaintiffs demand the production of 13 documents that were withheld by Defendant under claims of privilege. (Dkt. No. 26 at 2.) They also seek responses to two requests for production. Defendants maintain that the documents were produced in anticipation of litigation immediately after the accident, and that they are therefore privileged. They also argue that some documents are protected by the attorney-client privilege. Defendants raise defenses as to the two requests for production. The Court addresses each document reviewed in camera before turning to the requests for production.

Analysis

A. Privilege Log Document 157

Document 157 is a hand-written note that appears to show the barge in question, explaining how it was loaded and how the load was distributed. The note paper is labeled "Glacier Sand & Gravel Company," but there is no indication of who made the notes or when. Defendants argue that it is properly being withheld as work product. The Court disagrees.

Work product is not a privilege, but rather a qualified protection limiting discovery of "documents and tangible things" prepared by a party or his representative in anticipation of litigation or trial. Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486, 1494 (9th Cir. 1989). A party asserting work product privilege must show that the materials withheld are: (1) documents and tangible things; (2) prepared in anticipation of litigation; and (3) the materials were prepared by or for the party or attorney asserting the privilege. Garcia v. City of El Centro,

1 214 F.R.D. 587, 591 (S.D. Cal. 2003). A document is prepared “in anticipation of litigation” if
2 “in light of the nature of the document and the factual situation in the particular case, the
3 document can be fairly said to have been prepared or obtained because of the prospect of
4 litigation.” United States v. Torf, 357 F.3d 900, 907 (9th Cir. 2003) (citation omitted) (emphasis
5 added).

6 Even if a document is work product, Fed. R. Civ. P. 26(b)(3)(A)(ii) permits a party to
7 obtain discovery of work product only on a showing of “substantial need” for the documents and
8 an inability to obtain equivalent information from other sources. Even when a court orders
9 disclosure of work product, it must insure that “mental impressions, conclusion, opinions, or
10 legal theories of a party’s attorney or other representative concerning the litigation” are not
11 disclosed. Fed. R. Civ. P. 26(b)(3)(B). The party claiming work-product protection bears the
12 burden of establishing that it applies. Heath v. F/V Zolotoi, 221 F.R.D. 545, 549 (W.D. Wash.
13 2004) (Zilly, J.); see also Hernandez v. Tanninen, 604 F.3d 1095, 1102 (9th Cir. 2010).

14 Defendants fail to show that this drawing is work product. Defendants rely on the
15 assertion that all documents created after the accident were made in preparation for litigation.
16 Defendants’ in-house counsel states that “immediately after [the accident on] December 4,
17 2009,” she “directed our ensuing investigation, working principally through Safety Manager
18 Mike Moore.” (Lilley Decl. ¶ 2.) Defendants also argue that they immediately put the insurance
19 broker on notice and engaged a marine surveyor and then hired outside counsel four days after
20 the accident on December 8, 2009. (Dkt. No. 26 at 4; Dkt. No. 17 at ¶ 3.) While this may be
21 true, Defendants have failed to produce a single declaration from Mike Moore stating that this
22 document was prepared because of anticipated litigation. There is nothing indicating when it
23 was made, or even whether Mr. Moore created it. There is nothing indicating that it was
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1 prepared because of the prospect of litigation. The Court GRANTS the motion to compel on this
2 issue and orders production of the Privilege Log Document 157.

3 B. Privilege Log Document 223

4 This document is an email from Mike Moore to Mark Rock and someone with an email
5 address of "eowens@calportland.co\$", dated December 4, 2009 at 16:47:15. The message
6 describes the incident and actions planned to move the barge and its load. There appears to be
7 material redacted without any notation of the redaction, given that the message has a header of "--
8 -- Original Message ---", indicating there was a reply to the message that was deleted.

9 Defendants incorrectly argue this is work product. The document lacks any indication
10 that it was sent to counsel or that it was prepared because of the anticipation of litigation. The
11 mere fact that Glacier may have anticipated litigation does not show that this specific document
12 was created because of the possibility of litigation. The Court GRANTS the motion to compel
13 production of this document. Defendants must produce the email in its full, unredacted form.

14 C. Privilege Log Document 225

15 This is an email from Mike Moore to Mark Rock and Ed Owens. It has a title of "Barge
16 240 Incident Summary" and is dated December 4, 2009 at 11:28 PM. The body of the email
17 reflects its title: it is almost entirely a factual summary. There is no reference to attorneys or
18 litigation, there are no attorneys that appear to be copied on the email, and there is no evidence
19 that it was made at the direction of counsel or because of future litigation. The Court rejects
20 Defendants' assertion that this is work product. The Court GRANTS the motion to compel on
21 this issue and orders production of this document,

22 D. Privilege Log Document 226
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1 This document merely contains an email dated December 4, 2009 from Scott Nicholson
2 to Jim Tweedy, Ron Summers, and Mark Leatham without a subject line or any content.
3 Defendants contend that “its purpose was to forward other emails with photo.” (Dkt. No. 26 at
4 12.) No photos or other emails were produced for in camera review. There is no indication that
5 this is work product. The Court GRANTS the motion to compel production of this document.
6 Defendants must produce the full email in unredacted form, along with all attachments.

7 E. Privilege Log Document 227

8 This document is described in the briefing as an email forwarding a message between
9 management at Glacier. Yet the contents of the forwarded email are nowhere presented in the
10 email produced for in camera review. The document is a blank email from Ron Summers to
11 Allen Hamblen, Ed Owns, Scott Isaacson, and Mark Rock on the date of the accident. Scott
12 Isaacson is assistant general counsel to CalPortland. Be that as it may, it does not show that the
13 email was produced at the direction of counsel or in anticipation of litigation. It is not work
14 product. The Court GRANTS the motion to compel production of this document. Defendants
15 must produce the entire email along with any attachments.

16 F. Privilege Log Document 218

17 This document contains an email from Matthew Hinck, an environmental manager for
18 CalPortland to Scott Isaacson, dated December 4, 2009 with a subject line of “ITB 240.”
19 Defendants argue that this email was submitted to Scott Isaacson, assistant general counsel,
20 “transmitting photos the damaged barge with an action plan within his particular purview in
21 anticipation of litigation.” (Dkt. No. 26 at 13.) Defendants claim this is attorney-client and work
22 product privileged.

23 Work Product

1 The action plan may have some relationship to the litigation at issue and Isaacson is an
 2 attorney for the Defendants. However, there is no showing that the document was created
 3 because of future litigation. The totality of the circumstances does not suggest the document is
 4 work product. The Court does not find it properly withheld as work product.

5 Attorney-Client Privilege

6 The attorney-client privilege is a substantive issue and must be interpreted using the law
 7 of the state. Lexington Ins. Co. v. Swanson, 240 F.R.D. 662, 666 (W.D. Wash. 2007). In
 8 Washington, “[t]he attorney-client privilege applies to communications and advice between an
 9 attorney and client and extends to documents which contain a privileged communication.”
 10 Pappas v. Holloway, 114 Wn.2d 198, 203 (1990). The purpose is “to encourage free and open
 11 attorney-client communication by assuring the client that his communications will be neither
 12 directly nor indirectly disclosed to others.” Id. (quotation omitted). The privilege is not
 13 absolute; “it must be strictly limited to the purpose for which it exists.” Id. at 204.

14 The attorney-client privilege does not apply to this email. The information the client is
 15 giving to in-house counsel is not legal in nature, nor does it appear to be given in response to any
 16 advice from counsel. The document does not reveal confidential and legal advice. It is not
 17 privileged. The Court GRANTS the motion to compel on this issue. Defendants must produce
 18 the document, including any photos that were attached to the email that Defendants failed to
 19 produce for in camera inspection.

20 G. Privilege Log Document 219

21 This is an email from in-house counsel, Scott Isaacson to several recipients stating “FYI
 22 here are some pictures of the former flat deck barge.” Defendants claim this is work product and
 23 attorney-client privileged. The photos were not attached for in camera review. This document is
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1 not work product, as there is no indication that it was created because of the threat of litigation.
2 The document is not attorney-client privileged, as there is also no legal advice or opinion in the
3 email. The Court GRANTS the motion to compel production of this document. Defendants
4 must produce the entire email and the attached photos.

5 H. Privilege Log Documents 55 & 113

6 Defendants produced only privilege document 55, and claim that 113 is a duplicate, to
7 which Plaintiffs agree. As Defendants admit, the document bears no date and Defendants do not
8 know when it was created. Defendants claim that it reflects Jim Tweedy's notes. There is no
9 indication Jim Tweedy is the author. The document itself provides a factual account of what
10 happened during the incident based on what appear to be interviews.

11 Defendants have failed to show this document was created in anticipation of litigation or
12 whether it was prepared as part of a routine investigation. Defendants' state conclusorily that the
13 document was "prepared in anticipation of litigation." However, there is no declaration from Jim
14 Tweedy confirming this or any other indication that it was made in anticipation of litigation. The
15 totality of the facts does not confirm that this document is work product. Defendants must
16 produce it. The Court GRANTS the motion to compel production of this document.

17 I. Privilege Log Document 221

18 This document contains an email dated December 18, 2009 from Shawn Lilley, corporate
19 counsel at CalPortland, in which he provides the client with advice as to how to prepare for
20 litigation. The document is properly withheld as attorney-client privilege. The Court DENIES
21 the motion to compel the document.

22 J. Privilege Log Document 11
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1 This document was prepared by Blomquist Marine Surveys, Inc. on December 11, 2009
2 and certain underwriters. It states that it is preliminary advice for the exclusive use of the
3 underwriters. It opines as to the cause of the loss, the estimated repair cost, and future
4 investigations of the barge. Defendants claim it is work product, as it was created in anticipation
5 of litigation. The Court agrees. The totality of the circumstances satisfies the Court that it was
6 created in true preparation for litigation. The Court DENIES production of the document.

7 K. Other documents

8 Plaintiffs request production of 3 other documents that Defendants did not produce for in
9 camera inspection because doing so would have exceeded the 10 document limit the Court
10 imposed on in camera production. The Court considers the request for production of these
11 documents in spite of the lack of in camera review.

12 Document 12 is a status report created by the marine surveyor. Documents 42 and 94 are
13 letters and email generated one week after the accident by the marine surveyor retained by the
14 insurance broker. Based on the Court's ruling on Document 11, the Court DENIES the motion
15 to compel these documents. They appear to have been created in anticipation of litigation and
16 are properly withheld as work product.

17 L. Requests for Production

18 Plaintiffs argue that Defendants have wrongly refused to answer two requests for
19 production (numbers 5 and 17). (Dkt. No. 26 at 9.) Plaintiffs seek personnel files for the barge
20 workers. Defendants oppose this request on the grounds that there is a strong public policy
21 against disclosure of personnel files. Plaintiffs also request information about permits and
22 licenses Defendants may or may not have.

1 As to the personnel files, the only case Defendants cite for support undermines their
2 position. The case includes a statement that “where the files sought are those of employees
3 whose action or inaction has a direct bearing on the Plaintiff's claims or Defendant’s affirmative
4 defenses and especially where, as here, the court has issued an appropriate confidentiality order,
5 personnel files are subject to discovery.” Cason v. Builders FirstSource-Southeast Group, Inc.,
6 159 F. Supp. 2d 242, 247 (W.D.N.C. 2001). This supports Plaintiffs’ argument. Plaintiffs
7 contend they seek information about workers who may be responsible for the damage. The files
8 directly bear on Plaintiffs’ claims. The Court GRANTS the motion on this issue and orders
9 production of the documents sought in request for production number 5.

10 Plaintiffs also argue that Defendants have wrongly refused to produce “all licenses,
11 records, permits, registrations and other documents which evidence defendants’ right or
12 entitlement to operate their Duwamish or Dupont Facilities on December 3-4, 2009.”
13 Defendants argue that this request is overly broad and not likely to lead to discoverable
14 materials. Plaintiffs contend reasonably that such materials may bear on whether Defendants’
15 defense related to proper loading and unloading is tenable. Plaintiffs argue that the permits and
16 licenses may show what proper loads should have been on the barge. The Court agrees. The
17 Court GRANTS the motion and requires production of documents responsive to request for
18 production 17. Defendants may withhold privileged documents, provided the privilege is
19 properly asserted and they create a privilege log.

20 **Conclusion**

21 The Court GRANTS in part and DENIES in part the motion to compel. Defendants have
22 wrongly withheld production of documents 55, 113, 157, 218, 219, 223, 225, 226, 227. They
23 must be produced to Plaintiffs within 5 days of entry of this order. Defendants have properly
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1 withheld Documents 11, 12, 42, 94, and 221. Defendants are not required to produce those
2 documents. However, Defendants have improperly refused to respond to Plaintiffs' requests for
3 production 5 and 17. The Court GRANTS the motion on this issue and requires production of
4 responsive documents within 5 days of entry of this order.

5 The clerk is ordered to provide copies of this order to all counsel.

6 Dated this 24th day of January, 2011.

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10 Marsha J. Pechman
United States District Judge
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